THE CENTRAL CRIMINAL COURT

BILL NO. C.C. 0034/2008

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

PATRICK DUFFY AND DUFFY MOTORS (NEWBRIDGE) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 23rd March, 2009

The Charges:

1. Arising out of an investigation conducted by the Competition Authority into the activities of an association describing itself as the "Citroen Dealers Association", Duffy Motors (Newbridge) Limited ("Duffy Motors") of Naas Road, Newbridge, Co.Kildare was charged with a number of offences including those listed at Counts 5 and 6 of Bill No. CC0034/2008. These charges were in the following terms:-

* "**Count No. 5**

Statement of Offence

Entering into an agreement which had as its object the prevention, restriction or distortion of competition contrary to s. 4(1) of the Competition Act 1991, and s. 2 of the Competition (Amendment) Act 1996.

Particulars of Offence

Duffy Motors (Newbridge) Limited, trading as P.G. Duffy & Sons, between the 24th June, 1997, and the 18th June, 2002, both dates inclusive, within the province of Leinster within the State, being an undertaking within the meaning of s. 3 of the Competition Act 1991, did enter into an agreement with other undertakings, also within the meaning of s. 3 of the Competition Act 1991, which had as its object the prevention, restriction or distortion of competition in the trade of motor vehicles in the province of Leinster by directly or indirectly fixing the selling price of Citroen motor vehicles." (emphasis added)

* **"Count No. 6**

Statement of Offence

Implementing an agreement which had as its object the prevention, restriction or distortion of competition contrary to s. 4(1) of the Competition Act 1991, and s. 2 of the Competition (Amendment) Act 1996.

Particulars of Offence

Duffy Motors (Newbridge) Limited, trading as P.G. Duffy & Sons, between the 24th June, 1997, and the 18th June, 2002, both dates inclusive, within the province of Leinster within the State, being an undertaking within the meaning of s. 3 of the Competition Act 1991, did implement an agreement with other undertakings, also within the meaning of s. 3 of the Competition Act 1991, which had as its object the prevention, restriction or distortion of competition in the trade of

motor vehicles in the province of Leinster by directly or indirectly fixing the selling price of Citroen motor vehicles." (Emphasis added)

2. As part of the same investigation Mr. Patrick Duffy, who is the joint owner and a co-director of Duffy Motors, was also charged with a number of offences including those outlined at Count No's 1 and 2 on the same indictment. These counts read as follows:-

* "**Count No.1**

Statement of Offence

Being a director of an undertaking which entered into an agreement which has as its object the prevention, restriction, or distortion of competition contrary to s. 4(1) of the Competition Act 1991, and ss. 2 and 3(4)(a) of the Competition (Amendment) Act 1996.

Particulars of Offence

Patrick Duffy between the 24th June, 1997, and the 18th June, 2002, both dates inclusive, within the province of Leinster within the State, were a Director of Duffy Motors (Newbridge) Limited, trading as P.G. Duffy & Sons, an undertaking within the meaning of s. 3 of the Competition Act 1991, which said company committed an offence namely entering into an agreement with other undertakings, also within the meaning of s. 3 of the Competition Act 1991, which had as its object the prevention, restriction or distortion of competition in the trade of motor vehicles in the province of Leinster by directly or indirectly fixing the selling price of Citroen motor vehicles and the

doing of the Acts constituting that offence will authorise or consented to by you." (Emphasis added)

* **"Count No. 2**

Statement of Offence

Being a director of an undertaking which implemented an agreement which had as its object the prevention, restriction or distortion of competition contrary to s. 4(1) of the Competition Act 1991, and ss. 2 and 3(4)(a) of the Competition (Amendment) Act 1996.

Particulars of Offence

Patrick Duffy between the 24th June, 1997, and the 18th June, 2002, both dates inclusive, within the province of Leinster within the State, were a Director of Duffy Motors (Newbridge) Limited, trading as P.G. Duffy & Sons, an undertaking within the meaning of s. 3 of the Competition Act 1991, which said company committed an offence namely implementing an agreement with other undertakings, also within the meaning of s. 3 of the Competition Act 1991, which had as its object the prevention, restriction or distortion of competition in the trade of motor vehicles in the province of Leinster by directly or indirectly fixing the selling price of Citroen motor vehicles and the doing of the Acts constituting that offence will authorise or consented to by you." (Emphasis added)

3. In layman's terms the following allegations were made against the company:-

(1) That between the 24th June 1997 and the 18th June 2002, it entered into an agreement with others, to fix the selling price of Citroen motor

vehicles throughout the province of Leinster, with the object of interfering with competition contrary to s. 4(1) of the Competition Act 1991, and s. 2 of the Competition (Amendment) Act 1996, and

(2) That between the same dates, it implemented such an agreement with others, to fix the selling price of Citroen motor vehicles throughout the province of Leinster, with the object of interfering with competition, contrary to s. 4(1) of the 1991 Act s. 2 of the 1996 Act.

And as against Mr. Duffy

(3) That as a Director of the company he consented to and authorised that company to enter into the aforementioned agreement contrary to s. 4(1) of the Competition Act 1991, and ss. 2 and 3(4)(a) of the Competition (Amendment) Act 1996, and

(4) That as a director of this company he consented to and authorised that company to implement such agreement contrary to the same provisions of both the principle and the amending Act.

4. On the 26th January 2009, Mr. Duffy pleaded guilty to counts No's 1 and 2 on the indictment and as a director of the company pleaded guilty on its behalf to the aforesaid counts 5 and 6. On these pleas being entered the D.P.P., indicated that he would enter a *nolle prosequi* on the other charges.

5. Having heard evidence and having received submissions from both the D.P.P. and the defendants, I reserved my view on what the appropriate sentence should be. I now give a ruling in respect thereof.

The Investigation:

6. The background evidence relating to these prosecutions was given by one Mr. Thomas Fitzpatrick, an authorised officer with the Competition Authority. It appears that in March 1995 an association known as the Citroen Dealers Association (the "C.D.A.") was established. It was geographically divided into three regions, namely Dublin/ Leinster, the South and the North/West. It held its first meeting in April 1995 and operated at least until February 2004. This association, whose members consisted of the authorised dealers for Citroen motor vehicles in this State, appointed officials such as a Secretary, Treasurer and President, and kept detailed minutes of its activities.

7. From the outset it set in place a comprehensive scheme which had the following as its objects:-

(i) The setting of maximum discounts from the retail dealers recommended price list for new Citroen motor vehicles;

(ii) The setting of delivery charges in respect of such vehicles;

(iii) The setting of accessory prices;

(iv) The setting of prices for metallic paint;

(v) The setting of prices for trade-ins and for used stock; and,

(vi) The setting of export prices and parts.

8. At meetings of the Association, of which about 48 were minuted, prices were agreed in respect of each of these items and then recorded. Thereafter a new revised price list would be printed and distributed by the Secretary to each member of the association. In addition, the Secretary produced a pocket card for internal use by

individual dealers showing what price should be asked for. This became known as the "card price". This routine was followed on every occasion upon which there was a price change.

9. To underpin adherence to the objectives of the scheme, the association employed two independent companies to police its members so as to ensure compliance. These monitors carried out so called "mystery shopping surveys", during which, disguised as genuine members of the public, they attended at a dealer's premises and obtained a quote or price for any one or more of the products above mentioned. A report would then be submitted to the Secretary. Fines, which were specified for any breach, were originally set at £500 and later increased to £1,000 (€1,270).

10. It appears that the initiation of the Authority's investigation was triggered by the association's attempt to sanction a defaulting dealer who refused to pay the imposed fine. Instead, the individual in question, who was later joined by two other dealers, made himself known to the Competition Authority, and his co-operation with the investigation led him to make thirteen statements and to produce over 160 relevant documents. Armed with these documents, Mr. Duffy was approached in March 2004. He was interviewed under caution and in the resulting statements made to the investigating officers, he confirmed that he was the sole representative of Duffy Motors on the association, that he had attended virtually all of the association's meetings and that for about a three year period he had acted as its treasurer. In that capacity he was responsible for discharging the outgoings of the association including

the expenses of the Secretary and the costs of employing the so-called independent monitors. He continued to be a member until, as previously stated, early in 2004.

11. As part of the Authority's engagement with Mr. Duffy, he produced a computer printout showing how the delivery charge of €500 was calculated. Mr. Fitzpatrick took strong issue with the justification proffered for some of the individual items making up that charge. It was common case that €87 was dealer profit with a strong likelihood of another €90 also falling this way. When a query regarding the €50 allocated for valeting is added in, one is left with the distinct impression that a much higher percentage of this charge was solely profit, than the calculations might at first suggest.

Personal Circumstances of both Defendants:

12. Mr. Duffy, who was born on the 11th December 1956, is a married man with two sons aged eighteen and sixteen. He has been involved in this type of business since early in his youth. In fact, Duffy Motors started out as a family run business, having been established by his father in 1952, and continues to be so to this day. At first it concentrated on the vehicle repair business and also had a small petrol station. The original family home was immediately adjacent to the business premises, as is Mr. Duffy's present family home.

13. In 1981, both Patrick Duffy and his brother Gerard, became 50% shareholders in and directors of Duffy Motors. In 1983, they expanded the business by entering the used car market. Some six years later they obtained a Citroen Dealership. In 1995/1996 the old petrol station was converted into a Shell franchise with a type of

convenience shop attached. Some two or three years later a new showroom was put in place. This type of layout continued until about two years ago when significant capital was invested in the construction of a new showroom. This was put in place to cater for the acquisition of a Mazda Dealership as well as for the continuation of the Citroen one.

14. Evidence was tendered, without objection, from McCrohan, Quinn & Co., Auditors, who had accessed the books of Duffy Motors and who had looked at certain information published by the S.I.M.I.. In particular they examined:

i) Straight sales of Citroen's vehicles for the year 1999,

ii) Straight sales of the vehicle "Xsara" for the months of May to October 2000,

iii) Straight sales for the months of March to April 2001, and

iv) Straight sales for the months of January to June 2002.

The tendering of this information was for the purpose of demonstrating whether the price obtained was above, below, or on a par with the prices set by the C.D.A.; in other words, whether or not the defendants were adhering to the rules of the association. Further, the evidence sought to establish that the relevant market was highly competitive and that no price fixing was in fact taking place. There was other evidence showing how tight the margin was for a Citroen dealer, about 4%, when compared to other dealers where the margin might be in the range of 7 – 10%. Finally, the figures also show that the sales of new cars have fallen in the past two years, including of course those of the Citroen and Mazda brands. This, it would appear, is in line with general economic conditions.

15. Mr. Shane Campbell, from the accountancy firm Campbell & Company, gave evidence with regard to the company's accounts for the year ending the 31st December 2007, and for the eleven months ending on the 30th November 2008. No adjustment was made in the evidence for those different accounting periods. The accounts show:-

(a) That T/O was down 14% from 2007 (€9.87m) to 2008 (€8.5m)

(b) That the profit/loss before tax was €96,342 in 2007 and (€268,419) for 2008,

(c) That the retained profit C/F was €1,765,000 in 2007 and €1,497,000 in 2008,

(d) That the stock figure for both accounting periods was similar,

(e) That the cash available, in hand or in the bank, dropped by €1,000,000 to €227,170 in 2008, and

(f) That the net current assets fell from €1,398,000 in 2007 to €143,000 in 2008

16. A few further points about the figures should be noted. Firstly, there was a drop in 2008 of about €190,000 in the earning figure before interest, tax and amortisation of fixed assets. This negative cash flow has to and is being addressed by, amongst other things, a review of the company's cost base. Secondly, the margins are also down; overall about 23%, but in respect of car sales about 60%. This is broadly reflective of the national trend and is in line with the current recession. Thirdly, it should be noted however that in the last two years a very considerable sum, in excess of €1,000,000 (see para. 15(e) *supra*) was spent by the company in constructing new show rooms to accommodate the Mazda Dealership. This is reflected in note 7 to the

Balance Sheet. And finally in 2007, the two directors drew down a total of €189,000 as salary; that sum reduced by €25,000 in 2008 and a further reduction to €120,000 is expected this year. Apart from these salary figures I have no other information about the asset position of Mr. Duffy.

17. It seems to me from these accounts that having reviewed its cost base, this company, which employs over twenty people, is well capable of seeing out the general downturn in its business. Given its investment, and with prudent management, it should be in a good position to take advantage of growth prospect when the economy recovers.

Short Summary:

18. As set out above the investigation conducted by the Competition Authority revealed the existence of this association, which had as its members those with authorised dealerships in Citroen motor vehicles. It covered the entire country, although regionally based. It existed for the most part of ten years. It was formal and had an established structure to it. Its members appointed officers who held various positions for different periods. Its purpose was clear cut with intent and deliberately designed so that its core objects could be achieved. It kept detailed records and printed and published new price lists after every price movement. Realising that there could be no honour, even amongst thieves, the association provided for sanctions or penalties so as to coerce the effectiveness of its goals. Without the fortunate circumstances which led to the authorities' intervention, effectively by means of a "whistle blower", the activities of the association could well be still ongoing. It was

per chance, and one must assume out of self interest, that the unfolding events first emerged.

History: Anti-Competitive Behaviour:

19. In 1957 the Treaty of Rome was signed. It placed a particular emphasis on competition. It declared competitiveness, listed as an objective of full integration, as being indispensable to economic growth and prosperity and in the process as being a fundamental way of truly serving customer and consumer welfare. Specific provisions aimed at undertakings engaged in commercial and economic activity were provided for. Article 85 (now Article 81), which referred to agreements between undertakings, decisions by associations of undertakings, and concerted practices, prohibited all such arrangements if the same affected community trade and either by object or effect interfered with competition in the common market. Article 86 (now Article 82) dealt with dominant abuse. These provisions were contained in an International Treaty and, therefore, had no direct or immediate force in domestic law. They covered interstate trade and did not apply within internal boundaries. That was addressed in 1991 by the passing of the first piece of competition legislation in this country, the Competition Act 1991, which had as one of its essential purposes the implementation of Articles 85 and 86, as they were then numbered. Section 4 of the Act effectively enacted Article 85 into Irish Law with s. 5 essentially replicating the provisions of Article 86.

20. These provisions in themselves lacked enforceability by sanction. This was corrected by the Competition (Amendment) Act 1996, whose provisions have further been strengthened and updated by the present consolidating and amending Act of

2002 (the Competition Act 2002). Accordingly, breaches of ss. 4 and 5 have been criminal offences in this country for more than ten years. The reason for criminalising such behaviour and activity is clear cut. It is to secure the effectiveness of and to provide support for the enforcement of these pro-competitive provisions.

21. Section 4(1) of the 1991 Act gives examples of what constitutes anti-competitive behaviour. These examples were taken as representing some of the most damaging activity committed on a free market and *per se* constitute a treacherous danger to an open economy. Above all, such conduct was anti-consumer. The matters listed in this section included price fixing. Therefore it was patently clear that the Oireachtas held the same serious view about this conduct as I do, because in addition to criminalising such behaviour, the 1996 Act put in place certain statutory supports which would assist in any prosecution thereunder. Pursuant to section 3(1)(b) of this Act of 1996 such offences, following conviction on indictment, carry a maximum custodial sentence of two years and/or a fine of €3,000,000 or 10% of turnover, in the last financial year ending in the twelve months preceding conviction, not to exceed whichever sum is the greater. Under s. 8 of the 2002 Act, the period of imprisonment has been increased to five years with the specified fine now set at €4,000,000 or 10% of turnover for the relevant year, again not to exceed whichever of the two amounts is greater. Under s. 11 of that Act, all persons indicted for such offences must now be tried by this Court, rather than, as previously, where the Circuit Criminal Court also had jurisdiction.

Cartels:

22. There is no standard definition or even description of a cartel. Some are informal and undocumented; others are formal and documented. Most have policing structures and provide sanctions in case of breach. All are secretive in intent and purpose and thrive on concealment. Cartels involve a group of competitors who for self gain agree to restrict their individual business freedom and follow a common course of conduct on the market. They can be used for all forms of anti-competitive behaviour but are particularly attracted to price fixing, restricting output/limiting production, bid rigging and market allocation. These are "hard-core" infringements of competition law, and rightly so have been repeatedly described, as involving odious practices. They stifle competition and discourage new entrants; damaging economic and commercial liberty. As with this association, they remove price choice from the consumer, deter customer interest in product purchase and discourage variety. They reduce incentives to compete and hamper invention. They cause a transfer of consumer's money to themselves. They are offensive and abhorrent, not simply because they are *malum prohibitum,* but also because they are *malum in se*. They are in every sense anti-social. Cartels are conspiracies and carteliers are conspirators.

23. In February 2007, I said the following about cartels in the case of *Director of Public Prosecutions v. Denis Manning,* (Unreported, High Court, 9th February 2007):-

> *"This type of crime is a crime against all consumers and is not simply against one or more individuals. To that extent it is different from other types of crime: and while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect, every individual who wished to purchase, for cash, a vehicle from these dealers over the period which I have*

mentioned were liable to be de-frauded, and many surely were by the scheme and by the practices which unashamedly this cartel operated. These activities in my view have done a shocking disservice to the public at large."

24. Werden, in an essay entitled "*Sanctioning Cartel Activity: Let the Punishment fit the Crime*", delivered at a Seminar organised by the Irish Competition Authority on the 22nd November 2008, observes that:-

"Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses. Cartel activity, therefore, is not like tortious conduct, which is redressed with a liability rule focussing on the harm to victims and providing the incentive to take due care. Like other property crimes, cartel activity should be prohibited rather than merely taxed. As Judge Richard Posner explained of criminal sanctions generally, they 'are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it.'" (p. 6)

25. In his paper headed "*A Principal Argument for Personal Criminal Sanctions as Punishment under E.C. Cartel Law*", (2007) 4 Competition Law Review 7, 29, Whelan says that cartel activity *"aims to undermine and destroy a fundamental economic and political philosophy of Western democracies, i.e. free market capitalism and thus arguably violates prevailing mores."* Werden, in his essay, commenting on the U.S. Supreme Court's characterisation of the Sherman Acts, as establishing *"a*

regime of competition as the fundamental principle governing commerce in this country" (*City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 369 (1978)), noted at p. 7 of the article that *"[c]artel activity ... can now be seen as a major breach of social norms."*

I would respectfully agree, and strongly so, with these statements.

26. Wouter P.J. Wils in his article "*The European Commissions 2006 Guidelines on Anti-Trust Fines: A Legal and Economic Analysis*" World Competition, Vol. 30, (No. 2, June, 2007), notes at p. 8 that:-

> *"Setting up and maintaining a successful cartel requires effort. The cartel members have to select and coordinate their behaviour according to mutually consistent, collusive strategies, allowing the cartel participants as a group to increase profits, and providing for a fair distribution of profits between them. They also need to develop mechanisms to discourage cheating, involving monitoring, rewards and punishments. In a dynamic economy, successful cartels may have to develop an organisational structure that allows them to solve these problems continuously."*

27. It is therefore clear beyond argument and must be so declared that cartels operate one of the most serious forms of anti-competitive behaviour which exists, inflicting the most harm on customers, consumers and the public alike.

Sentencing – Europe:

28. Before I look at the principles of sentencing as applied in this jurisdiction it is worth noting some of the general provisions which the Commission and the European

Courts have applied to cartel activity and other anti-competitive breaches in this respect. Under Article 83(2)(a) of the EC Treaty, the Council was required to make Regulations or Directives designed to ensure compliance with the prohibitions laid down in Article 81(1) and Article 82 of the Treaty. The current Regulations in this regard are Council Regulations 1/2003, 'on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty'. Pursuant to Article 23(2)(a) of this Regulation the Commission, in September 2006, issued revised guidelines on setting fines for infringements of Articles 81 and 82.

29. The purpose such fines have as their objective is the prevention or deterrence of illegal conduct and where that occurs, the punishment of the offender (see *Chemiefarma v. Commission* [1970] ECR 661). Or as the Commission has stated on more than one occasion, *"the purpose of the fines is twofold: to impose a punitive sanction on the undertaking for the infringement and to prevent a repetition of the offence, and to make the prohibition in the Treaty more effective"* (see 13th Report on Competition Policy 1983, para. 62). To best achieve this purpose the new guidelines, which establish a two step methodology for the setting of fines, provide for a basic fine which may be adjusted by way of increase or decrease depending on the circumstances (see further para. 41 *infra.*). Examples of aggravating circumstances are; a continuation of the infringement after a finding to that effect, refusal to co-operate or obstruction and the role of leader, instigator or coercer. Mitigating circumstances include:

- Where the infringement is terminated after Commission intervention (this does not apply to cartels).
- Where the infringement has occurred through negligence only,

- Where the offender has cheated, and
- Where the offender has offered co-operation extending beyond and outside the scope of the investigation.

30. A comment can usefully be made on two of these circumstances:-

(i) Negligence – although not expressly defined, it was noted in the opinion of Advocate General Mayras in *General Motors v. Commission* [1975] ECR 1389, that:

> *"the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not foreseen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them".*

(ii) Substantially Limited Role (Cheating) – This would seem to include situations where an undertaking, although a member of the cartel:

> *"actually avoided implementing [the rules] by adopting competitive conduct on the market or, at the very least ... clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation" (Daiichi Pharmaceutical v. Commission (Vitamins)).*

There is no question of negligence applying in this case, but reference has been made to cheating.

31. Faull and Nikpay in "*The EC Law of Competition (2nd Ed.)*", (2007) summarise a number of arguments which have been rejected as mitigating factors by the European Commission. These include:-

(i) No Benefit from the Cartel – "*in general neither failure to benefit from a cartel or an economic disadvantage suffered due to participation in a cartel*", constituted an attenuating circumstance for the purpose of fixing the fine; *Citric Acid* [2002] OJ. L. 239/18 and several other cases such as *Zinc Phosphate* [2003] OJ. L. 150/1 and *Industrial Tubes* [2004] OJ. L. 125/50 (p. 1087)

(ii) Positive Contribution to the (European) Economy – "*the commercial benefits of industrial and commercial activity could not be used to offset the negative effects of the infringement of competition rules (Amino Acids [2003] OJ. L. 255/1, paras. 393-394; Vitamins [2003] OJ. L. 6/1 paras. 733-734).*" (p. 1088)

(iii) Defensive Measures against "Distortions of Competition" – "*[I]t is certainly not for the main players of a given market segment to take concerted private actions regarding the prices they charge to their customers in order to compensate, in any manner whatsoever, for 'dumping' strategies employed by undertakings from third countries.*" (*Citric Acid* [2002] OJ. L. 239/18, para. 291). In that case this argument was made in the context of Chinese imports which were state subsidised and allegedly being sold below cost. (p. 1088)

(iv) Customers not opposing the Illegal Practices – "*The fact that customers may accept a practice which is contrary to Competition*

Rules does not make such a practice lawful." (*Alloy Surcharge* [1998] OJ. L. 100/55, para. 57). (p. 1088)

(v) First time violation of Competition Law – The fact the offence is a first offence does not amount to a mitigating factor (*Enichem Anic v. Commission* [1991] E.C.R. 11-867, para. 295 (a CFI decision)), and although recidivism is an aggravating factor *"the absence of an aggravating circumstance does not amount to an attenuating circumstance."* (*Speciality Graphite* (decision of the 17th December, 2002, paras. 512-513). (p. 1088)

(vi) Cessation before Intervention – It is not a mitigating factor since *"cartel members ought to be aware of the illegal nature of their practice and the fact that a company terminates such a legal behaviour before intervention by the Commission does not merit any particular award"*: although it will be taken into account in the calculation of the base fine. (p. 1089)

(vii) Coercion or Pressure exercised by the Ringleader – *"An undertaking could have complained to the relevant authorities ... rather than participate in the activities in question."* (*Hüls v. Commission* [1992] E.C.R 11-499: *Préfileurope v. Commission* [1995] E.C.R. 11-791; *L.A.R.F. (1998) v. Commission* [2002] E.C.R. 11-1705): decisions of the CFI. (p. 1089)

(viii) Gradual Drift to Illegality – *"Arguments that cartels evolved from initial discussions of lawful matters ... and gradually drifted into unlawful activities"* have been rejected; *Zinc Phosphate* [2003] OJ. L. 153/1: *Industrial Tubes* [2004] OJ. L. 125/50. (p. 1089)

(ix) Poor Financial Situation of Company – If allowed for would *"be tantamount to giving an unjustified competitive advantage to those undertakings least well adapted to market conditions"*. (p. 1091).

32. Whilst the reasoning behind many of these decisions is compelling, it is however necessary to bear in mind that these have been handed down in a regime of sanction quite different to that which prevails both here and in the U.K. This results, *inter alia,* from there being no possibility of imprisonment by the European Courts for even the most egregious breach of competition law. The powers of the ECJ and CFI, as well as the Commission, extend only to fines and accordingly both the Guidelines and the decisions must be read in that way.

Sentencing – England:

33. In the U.K. the most recent decision is that of the Court of Appeal in *R. v. Whittle, Alison and Brammar* [2008] E.W.C.A. Crim. 2560, a case involving a prosecution under s. 188 of the Enterprise Act 2002, which carried, following conviction on indictment, a maximum sentence of five years and/or a fine without limit (s. 190). Although the peculiar facts in the case prevented the Court from laying down any specific guidance as to duration, Hallett L.J. does finalise her judgment by quoting from the U.K. Office of Fair Trade Report on the *"Proposed criminalisation of cartels in the UK"*, Hammond and Penrose (November 2001):-

> *"By way of general guidelines, we have noted the terms of the Hammond/Penrose Report which suggested the following factors as being relevant to any sentence passed:-*
>
> - *The gravity and nature of the offences:*

- *The duration of the offences:*
- *The degree of culpability of the defendant in implementing the cartel agreement:*
- *The degree of culpability of the defendant in enforcing the cartel agreement:*
- *Whether the defendants conduct was contrary to guidelines laid down in a Company Compliance Manual, and*
- *Mitigating factors, for example, any co-operation the defendant may have provided in respect of the inquiry: whether or not the defendant was compelled to participate in the cartel under duress: whether the offence was a first offence: and any personal circumstances of the defendant which the courts may regard as a factor suggesting leniency."* (para. 34)

She notes that although this list is not exhaustive, such considerations are *"plainly relevant"* (para. 35)

34. Several mitigating factors identified by the learned Judge are factors expressly rejected by the Commission and the European Courts when considering the imposition of fines in respect of cartel crimes. Nevertheless, and despite the justified obviousness inherent in Europe's position, I feel, that given the custodial option and that general sentencing principles must apply – stressing however as I do that weighting must be referenced to <u>that</u> crime – the correct approach when dealing with competition offences must therefore relate more closely to that outlined in *R v. Whittle, Alison and Brammar* [2008] E.W.C.A. Crim. 2560, rather than to that of the Commission or of the Courts.

Sentencing – Ireland:

35. In Irish Law it has been established for many years that any sentence imposed must reflect the crime and the criminal. It must be rational in its connection to both. It must be proportionate. Therefore, factors such as the seriousness of the offence (culpability, harm, behaviour *etc.*), the circumstances in which it is committed and the prescribed punishment must be looked at. As of course must be any aggravating circumstance as well as any mitigating one. The latter would include, if the evidence so established, matters such as a guilty plea, co-operation, remorse, absence of previous convictions, good character, unlikely to re-offend *etc.* This list must be added to by any other individual factor which is legally capable as attracting credit. Having done this exercise the appropriate sentence to fit the crime and the offender is then arrived at.

36. Whilst there is no place in the criminal justice system for either vengefulness or vindictiveness, there is, for deterrence. O'Malley, in *Sentencing Law and Practice,* (2nd Ed.) at para. 2-11 says:-

> *"Deterrence may be general or specific in nature. A penalty motivated by a policy of general deterrence aims to demonstrate to potential offenders and to society at large the painful consequences of certain wrongdoing. Specific deterrence is more concerned with the particular offender, and aims to impress upon him the punishment he will suffer if he re-offends. Both forms of deterrence are grounded on an assumption of rationality. Actual and potential offenders are presumed to have the inclination and capacity to weigh up the likely costs and benefits of any crime they may be tempted to commit."*

This last passage is particularly apt for offences such as insider trading and competition breaches. Subject to the stricture that a punishment can never exceed that available on the facts and must always be proportionate, both general and specific deterrence have an important role to play in many areas of criminal behaviour, including the examples herein given.

37. Werden (see para. 24 *supra.*) emphasises this point when he says that:

> *"Cartel activity materially differs from other property crimes only with respect to the purpose of sanctions. Rehabilitation and incapacitation are important purposes for most criminal sanctions, but deterrence is the only significant function of sanctions for cartel activity, and the specific deterrence of convicted offenders clearly is secondary to the general deterrence of potential offenders."* (p. 7)

In these respects I would agree. Competition crimes are particularly pernicious. Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place.

38. In this case, which is governed by the 1996 Act, and not the 2002 Act, the legislator has made provision for a custodial sentence or a fine or both. The maximum sentence in the case of an individual is two years with the maximum fine being €3,000,000 or 10% of turnover, in the financial year ending in the twelve months prior to conviction, whichever is the greater; (s. 3(1) of the Competition (Amendment) Act 1996). As is clear from the indictment, offences can be committed by a corporate undertaking (Counts 5 and 6), and by officers, including directors of

that undertaking (Counts 1 and 2); the latter being provided for by s. 3(4)(a) of the 1996 Act. Therefore, both entities can be guilty of offences arising out of the same prohibited conduct. This makes perfect sense as otherwise miscreant manoeuvres could set the sanction provisions at nought. It cannot, therefore, be argued that a penalty imposed on both, constitutes some form of double punishment. Each is being punished for what it, as a separate legal *persona*, did. It matters not what the size or corporate structure of the company is or that its directors are also sued. Both can commit offences even if the underlying circumstances are identical.

39. This type of issue was raised in the *People (Director of Public Prosecutions) v. Rosebury Limited* [2003] 4 IR 338. Dealing with a case where both the company and its principal had been fined for breaches of the Safety, Health and Welfare at Work Act 1989, Hardiman J., when speaking for the Court of Criminal Appeal, said:-

> *"There is no obligation on any person conducting a trade, whether it is the building trade or any other business, to incorporate the business which he is conducting. He is entitled to trade, as no doubt he started, in his own name and to bear personally the risks attaching to that, namely the commercial risks. The director, as many other people, chose not to do this but to incorporate a company for the purpose of interposing the company between himself and various liabilities which might arise in the course of business. That is a thing which a person is fully entitled to do. If someone sued the director in respect of the liabilities of the accused, one can assume the director or his lawyers will be quick to point out that they are two completely different entities. He has drawn down the veil of incorporation, the effect of*

which is to render him, except in restricted circumstances arising under the Companies Acts, safe from liability for the accused's debts.

"The same must clearly apply in reverse in circumstances like these. The director and the accused are not 'basically the same thing'. The accused may be the creation of the director's, but is created with the express purpose of being a separate entity. Moreover, s. 48 of the Act of 1989, as counsel for the prosecutor points out, specifically provides for the liability of an individual who is a director in addition to the liability of a company. That is plainly provided by a statute to which the court must give effect." (at 339 – 340)

Although the statutory code in *Rosebury* is different to that in the instant case, the parallels between both are striking and the circumstances similar. Therefore, in my view there cannot be any question of Mr. Duffy and Duffy Motors being identified "as one" for the purposes of penalty.

40. The two forms of punishment available are, as I have said, financial and custodial; much like the case in most, if not, all crimes triable on indictment. Normally a sentencing court might first consider whether a fine would fit the crime and the convicted, and if so, subject to funds being available, would not go on to consider a deprivation of liberty. If the imposition of a fine however was of doubtful effect then of course a gaol term would be considered. In a case like the present, this two step approach may not be the most appropriate. Rather, a court might feel that a more general overview involving the imposition of a mixed type of sentence is to be preferred.

41. Fines evidently play a significant role in criminal law. In competition cases the way in which the maximum amount is structured clearly indicates a strong relationship between the undertaking's business and the crime. Interestingly, the Commission's maximum fine is referable to 10% of annual turnover, but within this limit the fine may be based on up to 30% of the annual sales of the product, service *etc.*, to which the infringement relates; multiplied by the number of years of participation in that infringement. Further, the Guidelines make provision for an "entry fee", which will be between 15% - 20% of the yearly relevant sales, whatever the duration of the infringement; which serves to deter companies from even entering into cartel or other anti-competitive arrangements. The Enterprise Act 2002, on the other hand, has no limit on fines. In contrast, the Irish position differs from both. Whilst it has an upper limit, the amount is not determined in the same way as the Guidelines provide. Rather it permits the Court to take into account the turnover of the undertaking's entire business, irrespective of the causative connection between the offending behaviour and that turnover. Therefore in adopting this approach, and noting that 10% of total turnover could well exceed €3 million, the legislature has armed the sentencing court with an option which, at least in some cases, can seriously impact on an undertaking's business.

42. Notwithstanding this level of fine however, the availability of a custodial sentence is critical. On this complementary form of penalty, I had the following to say in *Manning*:

> *"In my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases. Firstly, such a sentence can operate as an effective deterrent in particular where if fines were to have the*

same effect they would have to be pitched at an impossibly high figure. Secondly, fines on companies might not always guarantee an adequate incentive for individuals within those firms to act responsibly. This particular point may not, in some circumstances have the same force where individuals are concerned. Thirdly, knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations against, and quite frequently against their employers. Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be a very powerful deterrent and finally, the imposition of the sentence for the type or category of persons above described can carry a uniquely strong moral message. Accordingly, they are in my view some very powerful reason to custodise an individual who has been found guilty under the Competition Acts."

43. I would like to re-assert these views and to further state, as I also did in *Manning*, that I see no room for any lengthy lead in period before use is commonly made of this supporting form of sanction. If previously our society did not frown upon this type of conduct, as it did in respect of the more conventional crime, that forbearance or tolerance has eroded swiftly, as the benefits of competition have become clearer. Every purchaser of goods or services now has a strong and definite appreciation of what competition can do for him or her. Therefore it must be realised that serious breaches of the code have to attract serious punishment.

44. In applying the above to this case, I must in principle be conscious of: the gravity of the offences; the circumstances in which these offences were carried out; the nature of the offences and the continuing duration of their commission; the part played by Mr. Duffy in them, his personal circumstances and the corporate circumstances of the company; any aggravating and mitigating factor; and, finally, where appropriate, apply the principles of proportionality and totality.

45. Counsel on behalf of the accused has submitted a number of mitigating factors for which he claims credit should be given. These are:

i) The unblemished reputation of the accused, so therefore the acts were out of character;

ii) The absence of previous convictions;

iii) Co-operation with the authorities;

iv) His plea of guilty;

v) The circumstances of the offence; and,

vi) The personal circumstances of the accused.

46. In principle, it must immediately be acknowledged that these factors are of a type that, if available on the evidence, a Court must consider as part of any sentencing process. However, the weight which might attach to any one or more must relate not only to the convicted but also the crime. Therefore the importance to be attached to any of them must be both offence specific and individual specific. Consequently their influence on sentencing will differ.

Out of Character / 1st Offence / Unlikely to Re-offend:

47. Mr. Hugh Mohan S.C., in support of his submission, sought to rely on certain comments made by Professor O'Malley in his book *"Sentencing Law and Practice"*, where he stated at p. 142:

> *"The absence of previous convictions may also indicate that the instant offence was out of character and was unlikely to be repeated."*

Although it may be true that the offence is unlikely to be repeated; as stated above, the ongoing and continuous nature of the cartel crimes would tend to suggest that the acts complained of were not, in fact, out of character. The accused was not a man of generally good character who committed an unfortunate, foolish or impulsive act. Whatever his public *persona*, which I have no doubt was a positive one, he was, in private, deliberately engaging in wanton criminal conspiracy against the greater public with the intention of defrauding them for financial gain. For five years, being the period of the indictment (in fact the Association operated for almost nine), he involved himself in the significant ongoing efforts which are required by the operators of criminal cartels. Operating a cartel is not a once off criminal act. It is not done on the spur of the moment. It is continuous and requires high levels of planning and organisation. A person seeking to successfully implement a price fixing agreement decides every day to go into work and therein to commit and conceal a criminal conspiracy. That person, typically will be well educated, businessly astute, either owns the business or has risen to senior management, and almost certainly will have done a value benefit / detection appraisal. He then proceeds, indefinite as to duration, ceasing only when confronted. For that person whose *persona* is representative of carteliers, it is very difficult to say that such behaviour is out of character.

48. Factors such as that the conduct concerned was a first offence and that the offender is unlikely to re-offend are, in my view, of limited application in cartel cases. This is so because of their generally pernicious nature, the fact that the perpetrators knew that their conduct was illegal, and the level of detailed planning and concealment involved in both the network and the activity. Further, given the white-collar nature of the crimes, it is almost invariable that persons convicted will have a low level of recidivism. However, as commented upon in the European Guidelines, whilst recidivism would be a substantial aggravating factor, its likely absence is not necessarily a weighty mitigating factor. In the imposition of every sentence all matters available for consideration must be given their due and proper weight. In many instances where an individual has no previous convictions and is unlikely to offend again, these are two highly influencing factors on a Court exercising its sentencing jurisdiction; as would be where the person is unlikely to have any past history, or, once caught, is unlikely to re-offend, or in future to engage in similar activity. In this class of case, however, these points, as well as favourable character references, will in general have less weight because of the type of individual likely to be involved and the type of conduct maintained.

Distress / Coercion:

49. It has also been said that the offences at issue were committed against the backdrop of a struggle for survival, rather than in the greedy pursuit of excess profit. That may, or may not, be true, but even if so it is still not a factor which the Court should consider a mitigating one. If credit was available for economic distress it would be the antithesis of competition. Competition in the market will inevitably cause hardship to some. It is through this that the consumer ultimately benefits and

not by sustaining the unsustainable. Even however if the Court could take account of such duress, there is no evidence in this case that Mr. Duffy was anywhere near the level of hardship which would be required even to take this submission seriously. He was not, after all, at or near poverty level. Indeed, there was no evidence at all to suggest any degree of financial strain. Nor is it a mitigating factor that, in effect, by being a Citroen dealer, he had little choice but to join the C.D.A.. Again, even if this were true, it could not be said that merely by joining the Association he was required to engage in anti-competitive acts, or indeed to assist in their implementation. Such a proposition is evidently self-answering.

Some Lawful Aims:

50. Similarly, no cognisance can be had of the fact that the C.D.A. may have started as a representative association with some legitimate purpose. Indeed, experience shows and case law demonstrates that many such associations are established ostensibly with a legitimate aim, but in truth under concealment exists as a conduit for illegal activity. Legal activities do not shroud or insulate illegal ones with any form of justification or mitigation.

"Object" / "Effect" Offences:

51. As appears from the indictment, all counts against both Defendants were based, *inter alia*, on s. 4(1) of the Competition Act 1991. Under that subsection and s. 2 of the 1996 Act charges can be brought where the prohibited conduct, either by "object" or "effect" interferes with competition. In this case the D.P.P. decided to prefer "object" offences and not "effect" offences, that is, offences which are defined by their purpose and not by their result. With such offences (entering and

implementing) I would suggest that whether or not the enterprise is successful, or beneficial or profitable, or otherwise, cannot have any relevance to the issue of guilt. If the end result could decriminalise the conduct then this type of offence would lack utility and be redundant. In addition, if the situation was otherwise the distinction between object and effect would be obliterated.

Cheating:

52. It has also been suggested that Mr. Duffy cheated on the cheaters and therefore should be rewarded for this conduct; as if it was somehow an accolade of merit. It was to support this submission that the evidence outlined at para. 14 *supra.* was tendered. Specific to that evidence it must be said that the same appeared incomplete at the least, and possibly even selective. The years 1997/1998 are ignored, and only a number of months of the years 2000, 2001 and 2002 are covered. In fact in the case of 2000 only a single product is dealt with. Therefore the overall value of the evidence given is highly problematic.

53. What the evidence was designed to suggest was that from time to time vehicles did not achieve their C.D.A. price and therefore, at least to some extent, there was non-implementation of the price-fixing arrangement. This of course can have no bearing on guilt. It may possibly however, in certain circumstances, be a factor for which some credit may have to be given. To be considered so, there must be clear and cogent evidence of a direct infringement(s) of the rules: this will not be satisfied by mere generalisation or by the giving of partial or selective data. A complete picture of all relevant material is essential. Whilst any such infringement(s) will be weighted

according to circumstances, those which have no positive effect on consumer welfare or no negative impact on cartel activities will be of little interest.

54. When considering evidence for this purpose it is quite legitimate for a court to also assess the nature of the ongoing relationship between the cartel and the convicted. In this way a court will be in a better position to truly measure the value of the suggested disruption or interference.

55. In this particular case I do not believe that the evidence is sufficient to draw any conclusion favourable to the Defendants. In addition to the Auditor's Report being unsatisfactory, it must be remembered that Mr. Duffy was, for a period of over three years, the treasurer of this association, and in total was a member for upwards of eight or nine years. He attended, throughout this period, virtually all its meetings and was, as previously stated, responsible for discharging its expenses on invoices submitted. This task included reimbursing the secretary and of significance paying the spotters. The fact, as has been suggested, that his contribution was not noted in the minutes is, in my view, virtually irrelevant. The position of responsibility held by him and his discharge of those functions are reflective only of an active and supporting cartelier. In such circumstances it could not be a correct characterisation to say that he was merely a passive attendee.

Co-operation:

56. It is said that Mr Duffy was fully co-operative with the authorities once questioned; that he was forthright about his attendance at meetings and voluntarily furnished documentation to the authorised officers and that as a result a considerable

amount of time and effort was saved. In reality, I doubt very strongly that his co-operation, which undoubtedly there was, was of any real value. At the point in time when he was interviewed, in March 2004, the investigation was well under way, and there existed, at that time, strong and compelling evidence against him. That evidence placed him at these meetings, identified the position he held within the authority and, of course, showed the decisions taken by the Association; all with the intent of implementing and/or continuing with its illegal activity.

57. For co-operation to count, when either considering a prosecution or when passing sentence, it would have to have far greater beneficial value. An obvious example is the way in which the existence of the Association came to light; even if those who contacted or co-operated with the Competition Authority were not granted general or qualified immunity, the giving of such information would have to be reflected by the Court. Co-operation must be judged by its utility whether in the impending investigation or otherwise. How useful has it been to prevent, detect, halt or disrupt the illegal activity? Its value as measured in this way can then be arrived at. Finally, the Authority's Cartel Immunity Programme could usefully be referred to in this context.

Guilty Plea:

58. Matters which must be taken into account are the guilty pleas, which have saved the D.P.P. considerable time and effort in having to prove the case against the Defendants. Court time has also been saved. In addition I must have regard for Mr. Duffy's personal circumstances, such as those outlined before me. All of these observations equally apply, of course, to the company and its corporate position.

Ancillary Order:

59. There is one other matter which requires mention: it arises out of s. 160 of the Companies Act 1990. Under that section Mr Duffy will be prohibited or disqualified from holding any directorship for a period of five years. It is said that such a disqualification is penal in nature and thus reckonable when formulating punishment.

60. The first point to be noted is that this is a mandatory consequence of the conviction whether by plea or verdict. It is not the imposition of a discretionary disqualification. In fact, this Court has no involvement whatsoever with it; it follows directly as a matter of law. In those circumstances, it might seem a little surprising to say that it should be taken into account in finalising sanction, as to do so might appear to be almost self-defeating to the section. Such a view however has not been determinative and as a result some judicial attention has been given to the correct designation of what has loosely been described as "ancillary orders". However as none of these cases are quite on point with the instant issue, I will deal only with some of them, and then briefly so.

61. (A) *Conroy v. Attorney General and Anor.* [1965] IR 411: where the issue was whether a mandatory disqualification from holding a driving licence for 12 months, following a s. 49 conviction (Road Traffic Act 1961 – incapable of driving due to drink), which otherwise carried a maximum of 6 months and £100 fine, or both, was such as to render the offence "non-minor" for the purpose of Article 38 of the Constitution. The Supreme court held that the ancillary order, although potentially

having punitive consequences, was not a punishment when considering the "gravity" of the offence, but rather was essentially a finding of unfitness.

(B) *The People (D.P.P.) v. Redmond* [2001] 3 IR 390: Having pleaded guilty to 10 charges of wilfully failing to make tax returns, the accused was fined a total of £7,500. The D.P.P. sought to review the "unduly lenient" nature of the sentence under s. 2 of the Criminal Justice Act 1993. The evidence showed that Mr. Redmond, in respect of undeclared income of £249,000 (to cover the offending and other years), had settled all his outstanding revenue liabilities for the sum of £782,000, which included interest, penal interest and revenue penalties. In dismissing the application the court of Criminal Appeal held that the cumulative amount paid could be taken into account when considering the proportionality of the final penalty.

(C) *The People (D.P.P.) v. N.Y.* [2002] IR 310: When sentencing a person who had pleaded guilty to two counts of rape, the Court of Criminal Appeal, having held that the distinction between primary and secondary punishment related to the distinction between minor and non-minor offences (*Conroy's* case), accepted that the notification requirement of s. 10 (to the Gardaí) and the obligation of s. 26 (to prospective employers if the employment involved children) of the Sex Offenders Act 2001, could *"constitute a real and substantial punitive element"* and so were matters *"to which the court is entitled to have regard"* (*ibid.* at 319).

(D) *Enright v. The Attorney General* [2003] 2 IR 321: This was a case where the notification requirements of the Sex Offenders Act 2001 were again at issue. The High Court, whose judgment was delivered a day before that given in *N.Y.*, held, having reviewed a number of authorities, including the influential U.S. Supreme Court decision in *Kennedy v. Mendoza-Martinez* (1962) 372 U.S. 144 at 148, that such provisions were not punitive, either in purpose or effect. Notwithstanding this

conclusion however, the Court was of the view that a Judge, when sentencing, is "probably" entitled to have regard to them, although given the *"minimal nature of the burden imposed"* these are not likely to *"materially"* affect sentence.

62. Given the diversity of purpose behind these decisions and noting in particular that the reasoning and conclusions of each Court are specific to the issue in question, it is difficult to extract general principles and apply them to a restriction not dealt with in any of these cases. Since no authority has been opened on s. 160 of the Companies Act 1990, I do not believe that a definitive view should be given on its provisions unless it is necessary to do so. In my opinion it is not because even if applicable, the disqualification must be weighted in the individual context of each case. In the instant one, I do not believe that it has any real or substantial disabling effect on Mr. Duffy.

63. I say this because it must be borne in mind that the disqualification is for a limited duration and that most probably Mr. Duffy will continue to work for the company almost exactly as he does at present. The disqualification will not cause him to loose his job; it simply means that he can no longer act as a director. In the circumstances of this case, where there is a family run business and where the only other director and shareholder is his brother, it is most likely that both the business and Mr. Duffy will continue much like the present. I therefore propose to defer expressing a view on the point until the facts are more appropriate.

Equality / Equity:

64. There is one other principle in this case which has not been touched upon as yet, and that is the principle of equality before the law. During the course of the

hearing, evidence was given that two other prosecutions had been taken arising out of the Citroen dealership cartel. These have been heard in the Circuit Criminal Court because, at that time, the 2002 Act had not come into force; thereafter all future prosecutions under ss. 4 and 5 were mandated for the Central Criminal Court. His Honour Judge Michael O'Shea dealt with both of these cases. They involved a Mr. Durrigan and a Mr. Doran.

65. On the 8th of May 2008, Mr Durrigan, who at times was president of the C.D.A., pleaded guilty to one count of authorising his company to "enter" into an agreement for the purposes of price fixing, contrary to s. 4 of the 1991 Act and ss. 2 and 3(4)(a) of the 1996 Act. He was sentenced to three months, suspended for two years. His company which pleaded guilty to one charge of "entering" into such an agreement, was fined €12,000.

66. Mr Doran, who also was president of the Association on occasions, pleaded guilty in October 2008, to the same charge as Mr. Durrigan did. He was sentenced to three months imprisonment, suspended for five years. Likewise his company pleaded guilty to one count of "entering" into such an agreement. It was fined €20,000, with €10,000 to be paid within six months and €10,000 to be paid within the year. The individual and corporate charges in both of these cases are in principle identical to counts 1 and 5 in this case. Mr. Fitzpatrick, in answer to counsel for the defendants, conceded that the circumstances surrounding both Mr. Durrigan and Mr. Doran were virtually indistinguishable from those of the Defendants in this action.

67. In *Manning*, I issued, in clear-cut terms, a warning that, in my view, the only real and effective deterrent for those involved in this type of unlawful behaviour might have to include a prison sentence. To date there seems to have been four cases in which a custodial sentence has been imposed for breach of the Competition Act: yet no convicted person has spent any time serving their sentence. I pointed out in *Manning*, more than two years ago, that this type of activity, of which price fixing is probably one of the more heinous examples, has been unlawful since 1991 (and potentially punishable by imprisonment since 1996), which is now almost 20 years. I warned that, because of the activity's harmful effects on the public, those involved would have to take note that any lead-in period for leniency could not be prolonged. I anticipated that the serving of a custodial sentence was near at hand. Two years on, I say once more that if the first generation of carteliers have escaped prison, the second and present generation almost certainly will not.

68. If I had been dealing with the cases of Mr. Durrigan and Mr. Doran, the results for both and their companies would not necessarily have been as they were. In saying that, I should immediately acknowledge that on the facts the learned judge of the Circuit Court was entitled to take the particular view which he did. For my part, however, fines, unless severe and severely impacting, are not a sufficient deterrent; as experience tells us so.

69. As noted previously a Court, under section 3 of the 1996 Act, could impose a fine, in the case of an individual, of €3,000,000 or 10% of turnover, whichever is the greater. This is a substantial figure but, of course, many companies would not be in a position to discharge it and likewise neither would many individuals. If that level of

fine does not have the desired effect of protecting members of the public, in particular consumers, then a custodial sentence is the only option. However in this case, because of the principle of equality before the law, it seems to me that, even making allowances for the differences between Mr. Duffy / his Company on the one hand and Messrs. Durrigan and Doran / their Companies on the other, a genuine sense of grievance could follow if I were to impose a sentence and demand its service by Mr. Duffy.

70. In *McMahon v. Leahy* [1984] IR 525, Henchy J., giving one of two judgments in the Supreme Court, dealt with this point in the context of Article 40.1 of the Constitution. In summary he held that persons coming before the Court who cannot be differentiated on the basis of relevant criteria should, broadly speaking, be treated equally: *"... like persons should be treated alike by the law..."* (*ibid.* at 541). Unless justified, there should be no inequality of treatment. It seems to be that whilst a distinction can be made between the earlier cases and this one, it is not such as would justify that degree of variation which the serving of a prison sentence would demand. The distinction with both Mr. Durrigan and Mr. Doran, is that they pleaded guilty to a single corporate and individual count of "entering" and authorising the company "to enter" into a price fixing agreement. Mr. Duffy and his company on the other hand also pleaded guilty to the additional charge of "implementing" such an agreement. The implementation, in my opinion, is a significant additional crime because, in effect, it puts in place and seeks to obtain the fruits of the agreement previously entered into. Whilst this differentiation must be reflected in the sentence, it is not such as would demand gaol.

Sentence

71. As I have said, solely on the basis, fortunate from Mr. Duffy's point of view, of keeping some alignment with Mr. Durrigan and Mr. Doran, I propose to impose a sentence of six months on Mr. Duffy in respect of the entering plea and nine months in respect of the implementing plea, but I will suspend the entirety of both sentences for a period of five years on him entering into the usual bond.

72. In respect of the entering plea, I propose to impose a fine of €20,000 on Mr. Duffy and in respect of the implementing plea a fine of €30,000. With regard to his company, I propose likewise to impose a fine of €20,000 on the entering plea and €30,000 with regard to the implementing plea. The total for the Defendants will therefore be €100,000.

73. I will give both Mr. Duffy and the company three months to pay one half of the total fine, and a further three months to pay the remainder; thus giving a total of six months for both to discharge the totality of the fine. Should Mr. Duffy fail to comply he will serve 28 days in default. In the case of the company, distress will apply.